

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

VICTOR SOLOMON,	:	
	:	
Petitioner	:	CIVIL NO. 1:CV-07-0545
	:	
v.	:	(Judge Conner)
	:	
KAREN HOGSTEN,	:	
	:	
Respondent.	:	

MEMORANDUM

Presently before the court is a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241, filed by petitioner Victor Solomon (“Solomon”), an inmate currently incarcerated at the Federal Correctional Institution in Allenwood, Pennsylvania (“FCI-Allenwood”). (Doc. 1.) Solomon is challenging his federal sentence in the United States District Court for the Southern District of New York. For the reasons that follow, the petition will be dismissed for lack of jurisdiction.

I. Statement of Facts

In October 2001, Solomon pleaded guilty to one count of use and carrying of a firearm during and in relation to a drug trafficking crime, see 18 U.S.C. § 924(c)(1)(A)(ii), in the United States District Court for the Southern District of New York. On February 6, 2002, Solomon was sentenced on that count to a term of imprisonment of seven (7) years, followed by three (3) years of supervised release. As a condition of his sentence, the district court ordered Solomon to “comply with

the directives of the Immigration and Naturalization servic (sic)^[1] and the Immigration laws." (Doc. 8-2 at 6.)

Solomon did not file a direct appeal. Further, Solomon has not filed any petitions challenging his conviction or sentence pursuant to 28 U.S.C. § 2255. On March 22, 2007, Solomon filed the instant petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241, challenging his guilty plea and sentence and claiming that his counsel was ineffective in advising him that pleading guilty would not subject him to any immigration consequences.² (See Doc. 1 at 6.) On April 25, 2007, the court issued an order to show cause, directing respondent to reply to Solomon's petition. (Doc. 7.) The matter is now ripe for disposition.

¹ This is a reference to the Immigration and Naturalization Service ("INS"). On April 23, 2007, the Department of Homeland Security changed the name of the Bureau of Immigration and Customs Enforcement ("BICE") (formerly INS) to the U.S. Immigration and Customs Enforcement ("ICE"). 72 Fed. Reg. 20131-02 (Apr. 23, 2007).

² In 1992, Solomon pleaded guilty in state and federal court to weapons charges stemming from one incident of criminal possession of a firearm in New York State. (Doc. 1 at 2.) He was sentenced to concurrent state and federal sentences, which he fully served, and was released from custody. (Id.) In the instant petition, Solomon makes no claim that his 1992 convictions were used to enhance the length of his sentence for his 2001 conviction. Rather, Solomon claims that his 1992 state and federal convictions, like his 2001 conviction, were based on invalid guilty pleas.

It is undisputed that Solomon is no longer serving his 1992 sentences and was released from custody prior to his 2001 conviction on a separate offense. Accordingly, this court does not have jurisdiction to entertain his challenge to the 1992 sentences pursuant to 28 U.S.C. § 2241. See Maleng v. Cook, 490 U.S. 488, 490-91 (noting that a habeas petitioner must be "in custody" under the conviction or sentence under attack at the time his petition is filed).

II. Discussion

“[T]he usual avenue for federal prisoners seeking to challenge the legality of their confinement,” including a challenge to the validity of a conviction or to a sentence, is a motion filed under 28 U.S.C. § 2255. In re Dorsainvil, 119 F.3d 245, 249 (3d Cir. 1997). See also United States v. Miller, 197 F.3d 644, 648 n.2 (3d Cir. 1999); Snead v. Warden, F.C.I. Allenwood, 110 F.Supp. 2d 350, 352 (M.D. Pa. 2000). The § 2255 motion must be filed in the district court where the defendant was convicted and sentenced. See 28 U.S.C. § 2255 ¶ 5 (the motion must be filed in “the court which sentenced him”).

A defendant can pursue a § 2241 petition only when he shows that the remedy under § 2255 would be “inadequate or ineffective to test the legality of his detention.” 28 U.S.C. § 2255 ¶ 5; see also United States v. Brooks, 230 F.3d 643, 647 (3d Cir. 2000). The inadequacy or ineffectiveness must be “a limitation of scope or procedure . . . prevent[ing] a § 2255 proceeding from affording . . . a full hearing and adjudication of [a] wrongful detention claim.” Okereke v. United States, 307 F.3d 117, 120 (3d Cir. 2002) (citing Cradle v. United States, 290 F.3d 536, 538 (3d Cir. 2002) (per curiam)). “It is the inefficacy of the remedy, not the personal inability to utilize it, that is determinative.” Cradle, 290 F.3d at 538 (citing Garris v. Lindsay, 794 F.2d 722, 727 (D.C. Cir. 1986)). Hence, “[s]ection 2255 is not inadequate or ineffective merely because the sentencing court does not grant relief, the one-year statute of limitations has expired, or the petitioner is unable to meet the stringent gatekeeping requirements of the amended § 2255.” Cradle, 290 F.3d at 539. If a

petitioner improperly challenges a federal conviction or sentence under section 2241, the petition must be dismissed for lack of jurisdiction. Application of Galante, 437 F.2d 1164, 1165 (3d Cir. 1971).

In the instant case, Solomon challenges the legality of his detention. Specifically, he contends that the 2001 guilty plea, which included a waiver of his right to appeal, is invalid because his counsel erroneously advised him that, as part of his plea agreement, he would not be subjected to deportation as a result of the conviction. Despite this alleged assurance from counsel, he claims that in 2005 he was informed by FCI-Allenwood staff that an I.N.S.³ detainer had been lodged against him. (See Doc. 1 at 5.) He also claims that he sought to reopen his immigration proceedings based upon the alleged violation of his constitutional right to due process and on the purported invalidity of his guilty plea. Apparently, the

³ See supra note 1, at 2.

immigration judge closed the case for lack of jurisdiction.⁴ Consequently, Solomon contends that he has no other recourse; he cannot file a direct appeal or a motion under 28 U.S.C. § 2255 because his time for filing these types of appeals has passed.

Clearly, Solomon has not demonstrated that the remedy under § 2255 would be inadequate or ineffective to test the legality of his detention. He did not file a direct appeal or a § 2255 motion in the sentencing court. Solomon's claim that he could not have timely brought the instant claims under § 2255 because he was only made aware of the deportation issue in 2005 is unavailing. The mere fact that Solomon's present circumstances preclude him from invoking the remedy available to him under § 2255 does not demonstrate the inadequacy or inefficacy of the remedy itself. See Cradle, 290 F.3d at 538 ("It is the inefficacy of the remedy, not the personal inability to use it, that is determinative."). Further, as noted above,

⁴ The record contains no supporting documentation on this procedure. Nonetheless, that matter is not, and cannot proceed, before this court. See Real ID Act, 8 U.S.C. § 1252(a)(5) ("a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this Act, except as provided in subsection (e)."). Included in this limitation are habeas corpus petitions under 28 U.S.C. § 2241.

Furthermore, Solomon's deportation is a collateral consequence of his guilty plea and conviction. See People v. Ford, 86 N.Y.2d 397, 403 (N.Y. 1995) ("[d]eportation is a collateral consequence of conviction because it is a result peculiar to the individual's personal circumstances and one not within the control of the court system."). Accordingly, the alleged failure to be warned of the deportation consequence of his guilty plea does not afford a meritorious basis for challenging Solomon's conviction. See Taveras-Lopez v. Reno, 127 F. Supp 2d 598, 605 (M.D. Pa. 2000).

that a § 2255 motion may be time-barred is not a valid reason for pursuing relief under section 2241. Id. at 539.

Solomon argues that his remedy under section 2255 was inadequate and ineffective because he was convicted in 2002 for conduct that is not a crime,⁵ and, as a result, this type of claim can be brought under section 2241. This argument may provide part of the justification for a section 2241 petition when a defendant is subject to the gatekeeping requirements of section 2255 for a second or successive § 2255 motion, see Dorsainvil, 119 F.3d at 251, but that is not this instance. Solomon has never filed a § 2255 motion, nor has he sought permission to file a second or successive § 2255 motion in the Southern District of New York.

In sum, Solomon has made no showing that § 2255 is inadequate or ineffective to test the legality of his conviction and sentence. Further, the remedy afforded under § 2241 is not an additional, alternative, or supplemental remedy to

⁵ Solomon relies on the United States Supreme Court's holding in Bailey v. United States, 516 U.S. 137 (1995) in arguing that the gun-related conduct for which he was convicted in 2002 was never a crime. The Court in Bailey held that § 924(c)(1) requires evidence sufficient to show an active employment of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense. Id. at 150. Solomon's conviction occurred nearly six years after the decision in Bailey. Thus, it does not stand to reason that he can claim an intervening change in substantive law based on Bailey has made him innocent of the federal charges against him. Moreover, Bailey did not change substantive law, rather it merely clarified the standards and burden of proof under § 924(c)(1). See Dorsainvil, 119 F.3d at 247 (noting that Bailey did not establish a new rule of constitutional law, but simply interpreted a substantive criminal statute).

that prescribed under § 2255.⁶ Consequently, the court will dismiss this § 2241 petition for lack of jurisdiction. Of course, dismissal has no effect on Solomon's right to file a § 2255 motion in the Southern District of New York. As noted above, there is no jurisdictional bar to such a motion. That a § 2255 motion would likely be untimely is clear; however, the statute of limitations is an affirmative defense that must be raised by the government, see United States v. Bendolph, 409 F.3d 155, 164 (3d Cir. 2005), or by the court, if it decides to do so *sua sponte*. Id. at 166.

An appropriate order will issue.

S/ Christopher C. Conner
CHRISTOPHER C. CONNER
United States District Judge

Dated: August 21, 2007

⁶ To the extent that Solomon argues that he is entitled to relief under the writ of *audita querela*, his argument is unpersuasive. The writ of *audita querela* is not available to Solomon, as his claims are cognizable under 28 U.S.C. § 2255. See United States v. Valdez-Pacheco, 237 F.3d 1077, 1080 (9th Cir. 2001). See also United States v. Baptiste, 223 F.3d 188, 189-90 (3d Cir. 2000) (holding that section 2255 is not rendered "inadequate or ineffective," thereby enabling a prisoner to resort to *audita querela*, by the mere fact that he cannot meet the stringent standards for authorizing the filing of a second or successive § 2255 motion); United States v. Banda, 1 F.3d 354, 356 (5 Cir. 1993) (stating that "the writ is not available where, as here, the defendant may seek redress under § 2255"); United States v. Ayala, 894 F.2d 425, 430 (D.C. Cir. 1990) (concluding that, because the appellant's claims were "clearly cognizable in a section 2255 proceeding[,]" his "only proper remedy [was] a motion under section 2255").

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KAREN HOGSTEN :
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ORDER

AND NOW, this 21st day of August, 2007, upon consideration of the petition for writ of habeas corpus (Doc. 1), and for the reasons set forth in the accompanying memorandum, it is hereby ORDERED that:

1. The petition for writ of habeas corpus (Doc. 1) is DISMISSED for lack of jurisdiction.
2. The Clerk of Court is directed to CLOSE this case.

S/ Christopher C. Conner
CHRISTOPHER C. CONNER
United States District Judge